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No. 05-595

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Authorities iii

I. Statement 1

A. The History of the Accusations 1

B. Autumn's Court Appearances 6

C. Supplemental Procedural History 9

D. The Ninth Circuit Opinion 10

II. Argument 11

A. Summary of Argument 11

B. The Crawford Rule Must Be Applied Retroactively to Cases on Collateral Review 12

1. Crawford replaced a rule which was "inherently unpredictable" and a "fundamental failure" with a rule which insists that the only permissible test of reliability is observance of the safeguard envisioned by the Framers: cross-examination 14

2. Gideon Replaced an Unpredictable System of Case-by-Case Decisions on the Need for Counsel with a Rule Requiring Adherence to an Explicit Bill of Rights Safeguard 17

3. Constitutional Reliability Cannot be Measured by the Roberts Test which was Determined to be Fundamentally Wrong 19

4. A Rule Can be Both a Watershed Rule and Subject to Harmless Error Analysis 22

5. Gideon, like Crawford changed our understanding of a constitutional right at a conceptual level but did not create a new right 23

6. Crawford, like Gideon, was a return to original constitutional principles 25

7. While Crawford is Like Gideon, it is Unlike Any Case in Recent Constitutional Jurisprudence 29

C. The Current Habeas Corpus Statute Incorporates the Retroactivity Standards of Teague v. Lane, and Therefore Permits Granting Relief on the Basis of a New Rule That this Court Applies Retroactively 31

1. The Text of § 2254(d)(1) Does Not Preclude Granting Relief on the Basis of a New Rule Made Retroactive by this Court 32

2. Section 2254(d)(1) Must be Read in the Context of the Entire Statute, Including the Specific Provisions Codifying Teague and Permitting Application of New Rules in Habeas Proceedings 36

3. The Examples Cited by Amici for Nevada of Situations in which the Retroactivity Provisions may not be Surplusage does not Alter the Statutory Construction Analysis Harmonizing § 2254(d)(1) with the Teague Provisions 40

III. Conclusion 47

Appendix

Appendix I - Cases Applying Crawford 1a

Appendix II - Retroactivity Provisions of AEDPA . . 4a

TABLE OF AUTHORITIES

Cases

Allen v. Hardy,
478 U.S. 255 (1986) 23

Appel v. Horn,
250 F.3d 203 (3d Cir. 2001) 43

Atkins v. Virginia,
536 U.S. 304 (2002) 38, 45

Aycox v. Lytle,
196 F.3d 1174 (10th Cir. 1999) 43

Banks v. Dretke,
540 U.S. 668 (2004) 21

Bartlet v. Delprat,
4 Mass. 702 (1808) 28

Batson v. Kentucky,
476 U.S. 79 (1986) 23

Beard v. Banks,
542 U.S. 406 (2004) 13, 30, 39

Bell v. Jarvis,
236 F.3d 149 (4th Cir. 2000) 43

Betts v. Brady,
316 U.S. 455 (1942) 18, 19, 24, 25

Bockting v. Bayer,
399 F.3d 1010 (9th Cir. 2005) 25

Branch v. Smith,
538 U.S. 254 (2003) 34

Bridge v. Eggleston,
14 Mass. 245 (1817) 28

Butler v. McKellar,
494 U.S. 407 (1990) 38

Caspari v. Bohlen,
510 U.S. 383 (1994) 38

Clay v. United States,
537 U.S. 522 (2003) 36

Collins v. Youngblood,
497 U.S. 37 (1990) 38

Comm. v. Chabbock,
1 Mass. 144 (1804) 28

Crawford v. Washington,
541 U.S. 36 (2004) . . . . . *passim*

Dodd v. United States,
545 U.S. 353 (2005) 44

Duncan v. Walker,
533 U.S. 167 (2001) 40, 45

Fisher v. Roe,
263 F.3d 906 (9th Cir. 2001),
overruled on other grounds, Payton v. Woodford,
346 F.3d 1204 (9th Cir. 2003) 42

Gebers v. State,
50 P. 3d 1092 (Nev. 2002) 9

Gideon v. Wainwright,
372 U.S. 335 (1963) . . . . . *passim*

Gosier v. Wellborn,
175 F.3d 504 (7th Cir. 1999) 40

Graham v. Collins,
506 U.S. 461 (1993) 38

Green v. French,
143 F.3d 865 (4th Cir. 1998) 40

Griffith v. Kentucky,
479 U.S. 314 (1987) 36, 37, 39

Hamilton v. Alabama,
368 U.S. 52 (1961) 18, 24

Horn v. Banks,
536 U.S. 266 (2002) 39

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 34, 36, 39

King v. Brasier,
1 Leach 199, 168 Eng. Rpts. 2002 (K.B. 1779) . . . 29

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 37

King v. Tucker (1808) 29

Koons Buick Pontiac GMC, Inc. v. Nigh,
543 U.S. 50 (2004) 37

Kyles v. Whitley,
514 U.S. 419 (1995) 21

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 33

Lindh v. Murphy,
521 U.S. 320 (1997) 32, 36

Lockhart v. United States,
126 S.Ct. 699 (2005) 34

Lockyer v. Andrade,
538 U.S. 63 (2003) 35, 41

Lonchar v. Thomas,
517 U.S. 314 (1996) 45

Longenecker v. Hyde,
6 Binn. 1 (1813) 28

Lorillard v. Pons,
434 U.S. 575 (1978) 38

Mackaboy v. Comm.,
4 Va. 268 (1821) 27

Mackey v. United States,
401 U.S. 667 (1971) 29

Maryland v. Craig,
497 U.S. 836 (1990) 19, 30

Mercadel v. Cain,
179 F.3d 271 (5th Cir. 1999) 43

Murillo v. Frank,
402 F.3d 786 (7th Cir. 2005) 40

Nettles v. Harrison,
13 S.C.L. 230 (1822) 28

Ohio v. Roberts,
448 U.S. 56 (1980) . . . 13, 14, 16, 19, 21, 22, 24, 30

O'Sullivan v. Boerckel,
526 U.S. 838 (1999) 44

Palko v. Connecticut,
302 U.S. 319 (1937) 17

Penner v. Cooper,
18 Va. 458 (1815) 28

Penry v. Lynaugh,
492 U.S. 302 (1989), overruled on other grounds,
Atkins v. Virginia, 536 U.S. 304 (2002) 38

Perine v. Van Note,
4 N.J.L. 146 (1818) 28

Picard v. O'Connor,
404 U.S. 270 (1971) 45

Powell v. Alabama,
287 U.S. 45 (1932) 17, 18

Powell v. Nevada,
511 U.S. 79 (1994) 38

Ramdass v. Angelone,
187 F.3d 396 (4th Cir. 1999) 40

Respublica v. Langcake,
1 Yeates 415 (Pa. 1795) 28

Rose v. Lundy,
455 U.S. 509 (1982) 44

Ross v. Moffitt,
417 U.S. 600 (1974) 24

Sawyer v. Whitley,
505 U.S. 333 (1992) 38

Schriro v. Summerlin,
542 U.S. 348 (2004) 10

Scott v. Illinois,
440 U.S. 367 (1979) 24

Sellan v. Kuhlman,
261 F.3d 303 (2d Cir. 2001) 43

Slack v. McDaniel,
529 U.S. 473 (2000) 44

Smith v. Digmon,
434 U.S. 332 (1978) 43

Solem v. Stumes,
465 U.S. 638 (1984) 22, 38

State v. Webb, 2 NC 103 (1794) 28

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 38

Strickland v. Washington,
466 U.S. 668 (1984) 20

Teague v. Lane,
489 U.S. 288 (1989) . . . . . *passim*

Tyler v. Cain,
533 U.S. 656 (2001) 22, 33

Union Pacific R. Co. v. Laramie Stock Yards Co.,
231 U.S. 190 (1913) 33

United States v. Gonzales-Lopez,
126 S.Ct. 2557 (2006) 23

United States v. Granderson,
511 U.S. 39 (1994) 37

Vasquez v. Stack,
228 F.3d 143 (2d Cir. 2000) 40

Weeks v. Angelone,
176 F.3d 249 (4th Cir. 1999),
affirmed 528 U.S. 225 (2000) 43

Williams (Terry) v. Taylor,
529 U.S. at 362 (2000) 33, 35, 38, 39

Wilson v. Boerem,
15 Johns. 286 (N.Y. Sup. 1818) 28

Withrow v. Williams,
507 U.S. 680 (1993) 38

Statutes

28 U.S.C. § 2244(b)(2) 37

28 U.S.C. § 2244(b)(2)(A) 33, 34, 39, 44

28 U.S.C. § 2244(d)(1) 37, 38

28 U.S.C. § 2244(d)(1)(c) 44

28 U.S.C. § 2254 . . . . . 9, 10, 12

28 U.S.C. § 2254(b) 40

28 U.S.C. § 2254(d) 32, 40-43, 45-46

28 U.S.C. § 2254(d)(1) . . . . . *passim*

28 U.S.C. § 2254(e)(2) 37

28 U.S.C. § 2254(e)(A)(i) 41, 42

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I.
STATEMENT

A. THE HISTORY OF THE ACCUSATIONS

Laura and Respondent Marvin Bockting were married in 1984. Laura had one child, Autumn, from another relationship at the time. Honesty, a daughter, was born about one year after the marriage. TT, p. 65.[1] The marriage was a rocky one almost from the beginning. The couple separated in 1986 for eight months when Laura was an exotic dancer[2] and had alcohol and drug problems. They reconciled for a short time and then decided to move to Las Vegas to look for work in October, 1987. TT, pp 66-72. Autumn was six and Honesty was three years old.

Autumn, her mother Laura, her sister Honesty, and her stepfather lived in a one room unit of a motel in Las Vegas. Laura described the room as "one bed, full-size bed, a kitchenette about the size [of the witness box], bathroom with no bathtub and a little closet space and that was it and cockroaches everywhere." TT, p. 75.

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[1] The entire trial transcript is not included in the Joint Appendix in order to avoid burdening the record. References in this brief are to "JA" when portions of the transcript have been included in the Joint Appendix; "TT" and "PHT" when the reference is to the trial transcript or preliminary hearing transcript and the section cited has not been included in the Joint Appendix.

[2] While her occupation may not ordinarily be relevant, here, Laura's occupation was relevant because Laura practiced her exotic dance routines at home while Autumn imitated her. TT, p. 177.

On Saturday, January 16, 1988, Marvin left in the morning to go to work but, according to Laura, did not return until the next day. TT, p. 79. At the preliminary hearing in state court, Laura Bockting testified that Autumn woke up at about 10 o'clock p.m.; she was upset but "she wasn't crying." PHT, p. 10. At the time of the trial, Laura Bockting testified that Autumn "was sobbing" when she woke up that night. TT, p. 19. Laura testified, "She looked like she had just woke up from a bad dream..."[3] Laura testified that Autumn told her that "her daddy put his pee-pee in her pee-pee, and that daddy put his pee-pee in her butt..." TT, p. 81. Laura said that Autumn did not tell her what day it had happened but that it was while Laura was in school. Laura testified that Marvin watched the children while she was in class. Laura began an evening vocational class on January 11, 1988 (the Monday of that week). PHT, p.12.[4] Laura Bockting testified to other statements made by Autumn that night including description of acts of cunnilingus, fellatio and

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[3] Judge Noonan's view of the statements was, "It may have been an excited or spontaneous utterance but one made under circumstances rendering it less, not more credible...It is a commonplace phenomenon for people of all ages to have nightmares and awake in distress. What they then say was bothering them carries no guarantee of trustworthiness; they are coming out of sleep, still responding to their sleeping state impressions. Autumn's second declaration was made to a police officer in the presence of her mother; she was under psychological compulsion not to let her mother down." JA 139.

[4] Autumn's testimony at the preliminary hearing conflicted with her mother's testimony at trial. Autumn said that her mother went to school in the morning and that her father did not take care of her while her mother was in school-- Susie, Daniel and Brian did. PHT, p. 31.

anal intercourse. TT, p. 81. Autumn had knowledge of sexual acts because her mother admitted that Autumn had taken showers with Laura and Marvin together and had observed them having sexual intercourse on several occasions. TT, p. 21.

According to Laura, when Marvin finally came home the next morning, the first thing she said to him was, "Where is the money for the rent?" because Marvin had not paid the rent on the room. She took the money from him, and despite the fact that she had supposedly been told by her daughter that she had been sexually assaulted, Laura left Autumn alone with Marvin, paid the rent and changed the "papers" for the room to her name only. TT, p. 86. She said that when she returned, she confronted Marvin; he denied any wrongdoing. Laura told Marvin she was going to take Autumn to be "checked" and Marvin said "I hope you do. I want you to." TT, p. 87. Laura said she waited two days to take Autumn to the hospital but she couldn't remember why she waited. TT, p. 88. Laura did not testify that Autumn experienced painful urination or other pain in her vaginal or rectal area at any time.

When Laura Bockting finally took Autumn to the hospital, Dr. Stacy Rivers examined her. She testified that her examination of Autumn's anus revealed "that there was a tear which, you know, doctors call a fissure..., a small tear that seemed to be healed-healing, I should say, and it was not bleeding at that time." She testified that "within a week there had been a tear of the rectal mucosa." TT, p. 141.[5] She also

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[5] Medline Plus, a Service of the U.S. National Library of Medicine and the National Institutes of Health defines anal fissure as, "a small split or tear of the anal mucosa that may cause painful

found that the hymen was "gaping wide open although it was not bleeding." She observed that "there was no laceration of the septum of the skin between the rectum and the vagina and no other lacerations or foreign bodies found up with the canal of the vagina or the rectum." TT, p. 142. She testified that the stretching of the hymen would have caused pain to the area and painful urination for several days. TT, p. 144.[6] The doctor was unable to estimate any time period when the hymenal stretching occurred and there was no testimony from the mother or anyone else that Autumn suffered any pain at any time relevant to the charges.

Detective Zinovitch, who had received only "on-the-job training with other more experienced detectives within the sexual assault unit," PHT, p. 51, testified that contact with the Police Department was not made until January 19, 1988,

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bowel movements and bleeding. There may be blood on the outside of the stool or on the toilet tissue following a bowel movement." The service describes the causes, incidence and risk factors as follows: "Anal fissures are extremely common in young infants but may occur at any age. Studies suggest 80% of infants will have had an anal fissure by the end of the first year....The incidence of anal fissures decreases rapidly with age. Fissures are much less common among school-aged children than among infants. In adults, fissures may be caused by constipation, the passing of large, hard stools, or by prolonged diarrhea..." Medline Plus, Medical Encyclopedia: "Anal fissure." www.nlm.nih.gov/medlineplus

[6] Defense counsel did not call a medical expert to testify and asked a total of eight questions of Dr. Rivers. The doctor was not asked on either direct or cross-examination, to determine whether the events described by Laura Bockting and the detective as having occurred within about ten days could have happened based upon the medical examination.

over two days after the date Laura Bockting said that Autumn told her about the incident with her father. PHT, p. 41. At that time, he said, Autumn would not talk to him. PHT, p. 42. On January 21, 1988, the detective interviewed Autumn at his office. He picked up Autumn and her mother and transported them to his office. PHT, p. 43. He described Autumn as "very talkative" and not frightened. PHT, p. 43. The detective said that Autumn described the same events that her mother testified to. PHT, p. 44-45.[7] The detective told Autumn about the anatomical dolls which he uses and he had Autumn use the dolls to demonstrate. PHT, p. 47. Laura Bockting testified that she was present when Detective Zinovitch interviewed Autumn. PHT, p. 15.

Before the Preliminary Hearing in the case, Autumn was sent to a counselor by the District Attorney's office. Diane Donovan was a "marriage and family therapist" from the Center for Interpersonal Studies. TT, p. 56. She testified that she saw Autumn once a week starting in March 1988 but did not say how long the treatment lasted. Autumn was seen by herself although her mother was there for parts of some sessions. Ms. Donovan testified at trial that Autumn "doesn't want to acknowledge that it happened." TT, p. 62.

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[7] Amicus Criminal Justice Legal Foundation, citing to the opinion of the Nevada Supreme Court, in its Statement of Facts represents that the interview conducted by Zinovitch was recorded and was "not suggestive, leading or indicative of a predetermined resolve to produce evidence of child abuse." The problem with this representation is that the Nevada Supreme Court could not have known how the interview was conducted as no recording of the interview was ever produced or introduced.

B. Autumn's Court Appearances

Preliminary Hearing

A preliminary hearing was held on April 25, 1988 before a Justice of the Peace. Autumn's testimony started out with a series of questions which she answered apparently without hesitation, including her recall of her discussion with the prosecutor the day before, the difference between the truth and a lie, where she attended school and her performance in school, who babysits her when her mother is in school (Susie, Daniel and Brian), who makes up her family and she identified both her mother and her stepfather in the courtroom. Autumn's testimony at the preliminary hearing is reproduced in full at JA 8-23.

The prosecutor asked her, "Did there come a time when your daddy touched you in a way that you didn't think he was supposed to touch you?" Autumn responded, "Yes." JA 14. She said it happened "A long time ago." Id. She then described an incident that occurred in a bathroom but said she was clothed and she couldn't remember how she was touched. JA 16. She recalled talking to the Detective and she remembered going to a doctor. JA 17. Laura Bockting was moved into the witness chair to console Autumn. Autumn testified that she remembered talking to the detective but not what she told him but she didn't remember what she told her mother. She testified that she did not remember her father saying that anything would happen to her if she told, JA 20, and when her mother told her to "be honest like when you told mommy and when you told Chuck (Zinovitch), that's all you got to say...," Autumn said "You already told them." JA 21. When the judge asked Autumn, "are you afraid that if you tell the truth that your daddy will hurt you?" the child responded "No." Id. Finally, the prosecutor asked Autumn,

"Do you remember what it was that you told your mommy?" she responded "no" and the court declared her unavailable as a witness. JA 22.

Evidentiary Hearing at Trial

On the first day of trial, before the State called its first witness, outside the presence of the jury, the prosecutor called Autumn to testify (apparently as a result of an unreported conversation at the bench).[8] JA 24. The full extent of the examination of Autumn was as follows:

> THE COURT: How are you doing, Autumn? Autumn, you okay? All right. Continuation of case C83110, State of Nevada versus Marvin Howard Bockting. The record will reflect the presence of defendant; his counsel, Mr. Blaskey; Mr. Lukens representing the State, the absence of the jury. And we have on the stand Autumn Jean Tresler Bockting.
>
> All right. Go ahead, counsel.
>
> MR. LUKENS: Autumn, this is when you have to stand up to be sworn.
>
> THE COURT: Can you stand up, Autumn? Can you stand up and raise your hand for me? Autumn, stand up now and raise your hand for us, okay.

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[8] The prosecutor had never intended to call the child as a witness. Two weeks before the trial in this case, the prosecutor filed a notice advising that he intended to elicit her hearsay statements instead of seeking live testimony. JA 26. He had already decided that he did not like what she had to say.

MR. LUKENS: Your Honor, I think under these conditions, I think that the witness is unable to testify.

THE COURT: Well, I think it is apparent without the jury if we can't get anything more than this, it is not likely when the jury is here we will do any better. Go ahead and assist, will you please.

Counsel approach the bench, please.

(Discussion at the bench which was not reported.)

JA 25.[9]

The court concluded,

> The very purpose of this statute was to avoid the problem we have here today where a little girl either is not willing to testify or for some reason is unable to or testifies in such an inconsistent manner that it means, in essence, that their testimony is worthless; and because of the fact that she is testifying in open court in front of strangers with all the things that surrounds that kind of setting.
>
> And this law was set in place, I think, to avoid some of the problems involved there with that kind of a testimony situation. There seems to be nothing that

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[9] Nevada represents that during this hearing, Autumn "became very distraught" Nevada's Brief on the Merits, p. 5, citing to the transcript quoted above and findings by the federal district court. This representation is not supported by the record. It is plausible that, since the prosecutor intended to introduce Autumn's statements through hearsay, she was led to believe by the prosecutor or her mother she needn't say anything.

> would take our case out of the typical situation that the law had contemplated.

TT, p. 35.

Marvin Bockting testified at the trial. As he has throughout this case, he denied that he had committed any of the acts testified to by his estranged wife and Detective Zinovich.

C. Supplemental Procedural History

Respondent accepts the procedural history set forth by Nevada beginning at page five of Nevada's Brief on the Merits but supplements it with the following procedural facts.

Marvin Bockting represented himself from the time of the Nevada Supreme Court's opinion on his direct appeal on March 8, 1993, until October 16, 2002, when the Ninth Circuit Court of Appeals appointed counsel to represent him on the appeal of the denial of his 28 U.S.C. §2254 petition.

His state post-conviction petition was decided at an ex parte proceeding in which testimony was taken but Bockting was neither present nor represented. Exhibit W to Answer, p. 3.[10] The appeal from that decision was decided without counsel or briefing. The Nevada Supreme Court, in dismissing his appeal, held that Bockting failed to prove that his counsel was ineffective even though he was not allowed an opportunity to even be present at the "hearing." Exhibit Z to

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[10] This practice has been subsequently condemned by the Nevada Supreme Court. See Gebers v. State, 50 P. 3d 1092 (Nev. 2002).

Answer. His federal §2254 petition was processed without benefit of the assistance of counsel and without a hearing. After ten years of litigating his case in proper person, he was appointed counsel by the court of appeals.

D. The Ninth Circuit Opinion

The Ninth Circuit held that the rule enunciated in Crawford v. Washington, 541 U.S. 36 (2004) should be applied retroactively to cases on collateral review. Schriro v. Summerlin, 542 U.S. 348 (2004) governed its analysis. Finding that the rule in Crawford was a "new rule," the court first compared the sentencing scheme in Summerlin with the cross-examination requirement of Crawford to assess whether admission of untested testimonial statements seriously diminishes accuracy of convictions as compared to judicial factfinding in death sentencing. Referencing numerous opinions of this Court and language in Crawford itself, the court found "the evidence that cross-examination decreases the possibility of inaccurate conviction is unequivocal." In contrast, the Ninth Circuit observed, this Court found the evidence of jury versus judge factfinding "too equivocal." JA 127-128.

Noting that accuracy and reliability do not exist in a vacuum, the Ninth Circuit assessed the nature of the change from pre- to post-Crawford Confrontation Clause jurisprudence. The court referred to this Court's description of the pre-Crawford doctrine as a "rare case" of "fundamental failure" and refused to accept the argument that the change was "a mere tweak on the admissibility of hearsay." The court, in examining whether the Crawford rule "alter[ed] our understanding of the bedrock procedural elements essential to the fairness of the proceeding" compared Crawford to Gideon v. Wainwright, 372 U.S. 335 (1963). As a result of this

comparison, the Court recognized that there are few rules which can be considered "bedrock" and determined that Crawford should join the "very limited company" of Gideon.

II.
ARGUMENT

A. SUMMARY OF ARGUMENT

Teague

For the purposes of retroactivity analysis, the rule in Crawford is like the rule in Gideon and very unlike any rule which has been examined by this Court since Teague. The developmental history of the two rules is strikingly similar. Gideon and Crawford both signified a change in course after the Court had taken an aberrational turn and strayed from the old, sounder precedents and the fundamental constitutional principles of the right to assistance of counsel and the right to confront witnesses, respectively. The nature of the change effected by each rule was not incremental but paradigmatic. The right to assistance and appointment of counsel existed in various forms both constitutionally and statutorily well before the rule in Gideon. Gideon replaced a system that depended on varying, subjective determinations as to the need for counsel to a rule requiring appointment of counsel for indigent defendants in all serious criminal cases based upon the fundamental constitutional principles explicit in the Bill of Rights. The right to confrontation of witnesses existed long before the rule in Crawford. Crawford replaced a system characterized by that Court as "inconsistent," "unpredictable," "subjective," and "amorphous" with a rule which returned to the historic constitutional principles carried over from the Common Law and made stronger and more explicit in the Bill of Rights.

AEDPA

The deference provision of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1) does not preclude granting relief on a claim based on a new rule which this Court applies retroactively. Nothing in the text of § 2254 bars granting relief on such a claim. Lack of any clear and specific language in the statute prevents this Court from concluding that Congress intended to eliminate the pre-existing habeas jurisdiction of the federal courts to grant relief on such claims.

The text of § 2254(d)(1), which refers to "clearly established Federal law," must be read in conjunction with the explicit retroactivity provision that Congress included in AEDPA. Once this Court applies a new rule retroactively, that new rule takes the place of the former rule, and thus becomes nunc pro tunc, the "clearly established" rule to which section § 2254(d)(1) refers. That is the only construction of the statute that follows the technical and common sense meaning of "retroactive," and that harmonizes the deference provision of § 2254(d)(1) with the retroactivity provisions in the statute, and thus gives effect to all of its provisions.

B. THE CRAWFORD RULE MUST BE APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW

The conviction in Mr. Bockting's case became final in 1993. Accordingly, the Court must determine: 1) whether "the Constitution, as interpreted by precedent then existing, compels the rule"–whether the rule is actually "new;" 2) if the rule is new, whether it is nevertheless retroactive because

it falls under one of two exceptions to nonretroactivity. Beard v. Banks, 542 U.S. 406, 411 (2004).

Nevada and its amici contend that the Ninth Circuit reached the wrong result due to errors in analyzing the rule's impact on fairness and accuracy and by applying a "watered down" test for whether the rule qualifies as a "watershed" rule. Nevada argues the Circuit lost its way because it conducted its analysis based upon the benefits of confrontation in general rather than concentrating on the operation of the Crawford rule specifically. Nevada's Brief on the Merits, p. 25. Nevada contends that the rule in Crawford is not based upon any effort to enhance reliability or accuracy but the rule was adopted only to correct a misunderstanding of the Framers' understanding of the Confrontation Clause. See Brief for the United States, p. 19. They add that Crawford's "contribution to accuracy is small" because some reliable evidence will be excluded under the rule and since the Roberts rule incorporated a requirement of reliability, if properly applied, the likelihood of accurate convictions could not be diminished. Finally, Nevada and its amici argue that Crawford cannot be placed in that small number of cases that qualify as "watershed" rules because, 1) unlike Gideon, which does qualify, the right to confrontation existed before Crawford and 2) the rule could not be a "watershed" rule because it is subject to harmless error analysis.

1. Crawford replaced a rule which was "inherently unpredictable" and a "fundamental failure" with a rule which insists that the only permissible test of reliability is observance of the safeguard envisioned by the Framers: cross-examination.

The Circuit Based its Analysis on the Specific Rule in Crawford

Nevada's argument begins with the accusation that the Circuit could not reach the right conclusion because it started in the wrong place. The right place to start, say Nevada and amici, is with the rule implementing the right, not with the right itself. If the discussion, the comparisons and the measurement of change are corrected based on the rule and not the right, Nevada and its amici argue that it will be obvious that the rule did not alter our understanding of the bedrock procedural elements necessary for a fair proceeding. The Circuit did set forth the long history of decisions of this Court describing the confrontation and cross-examination, as essential to "the accuracy of the truth-determining process." The result reached by the Circuit was clearly based upon a comparison of the unreliability, unpredictability and "fundamental failure" of the Roberts system of ad hoc judicial decision-making and the Crawford return to cross-examination as a pre-requisite to fundamental fairness. JA 130-131.

Crawford Created a New Standard for Accuracy

Nevada argues that "hoped-for increased accuracy was not the basis for the decision" in Crawford. Nevada's Brief on the Merits, p. 23. The language in Crawford refutes that contention:

> [T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford v. Washington, 541 U.S. 36, 61 (2004).

> This open examination of witnesses...is much more conducive to the clearing up of truth.

541 U.S. at 61-62, quoting 3 William Blackstone, Commentaries 373.

> Adversarial testing "beats and bolts out the Truth much better."

541 U.S. at 62, quoting Matthew Hale, History and Analysis of the Common Law of England 258 (1713).

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

541 U.S. at 68-69.

> Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure.

541 U.S. at 74 (Rehnquist, C.J., concurring).

Nevada argues that Crawford was less concerned with the risk of unreliability and unfairness in the Roberts rule than with "fidelity to the historically correct constitutional process." Nevada's Brief, p. 24. In fact, the entire thrust of the Crawford decision was to replace a system of unpredictable case-by-case decisions with a rule which insured that accuracy would be tested by the method provided for in the Bill of Rights: confrontation.

Language in the decision itself makes it clear that the intent was to insure both predictability and reliability:

> The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

541 U.S. at 63.

> [T]he Roberts test is inherently, and therefore permanently, unpredictable.

541 U.S. at 69, fn. 10.

> By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design. Vague standards are manipulable...the Framers had an eye toward politically charged cases like Raleigh's-great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*' providing any meaningful protection in those circumstances.

541 U.S. at 67.

> We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.

541 U.S. at 55.

2. Gideon Replaced an Unpredictable System of Case-by-Case Decisions on the Need for Counsel with a Rule Requiring Adherence to an Explicit Bill of Rights Safeguard

Nevada asserts that no right to counsel in state prosecutions existed before Gideon v. Wainwright, 372 U.S. 335 (1963), was decided, unlike Crawford in which, Nevada asserts, there was an existing rule. Nevada's Brief on the Merits, p. 29. An accurate review of the development of the rule in Gideon with the development of the rule in Crawford reveals remarkable parallels.

Almost thirty years before Gideon was decided, the Court in Palko v. Connecticut, 302 U.S. 319 (1937) recognized that the Sixth Amendment right to counsel had "been found to be implicit in the concept of ordered liberty and thus, through the Fourteenth Amendment, become valid as against the states." Id. at 324. The Court based this assertion on Powell v. Alabama, 287 U.S. 45 (1932). Powell established the right to counsel, including the right to appointment of counsel, in any capital case where the defendant is unable to retain counsel and is unable to "make his own defense because of ignorance, feeble-mindedness, illiteracy, or the like." Id. at 71. Before the Court decided Gideon, the right to the

appointment of counsel in all capital trials was clear. Hamilton v. Alabama, 368 U.S. 52 (1961).

In Betts v. Brady, 316 U.S. 455 (1942), the Court was asked to extend the right in Powell beyond capital cases with special circumstances to all criminal cases in state courts. The Court refused to expand the rule, finding that most states had some provision for the appointment of counsel in some category of cases either by statute or court rule[11] and the provisions of the Fourteenth Amendment already provided protections against fundamentally unfair convictions.

So when Gideon was decided, the Court replaced a system of case-by-case decisions on the need for counsel with a safeguard found explicitly in the Bill of Rights—determining that the only proper measure of whether a felony conviction meets the constitutional requirements of fairness, reliability and accuracy is a trial with the assistance of counsel.

The Court in Gideon traced the history of the rule requiring appointment of counsel and characterized its

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[11] See Appendix to the Opinion in Betts v. Brady, id., which sets forth the status of appointment of counsel rules in all states at that time. Justice Black, concurring in the opinion in Betts noted:

> In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases (e.g. where the crime charged is a felony, a 'penitentiary offense,' an offense punishable by imprisonment for several years) be provided with counsel on request....In only two states...has the practice here upheld by this Court been affirmatively sustained.

Id. at 477, fn. 2.

decision in Betts as "an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice." 372 U.S. at 344.

This is precisely what happened in Crawford. The Court found that the rule established in Ohio v. Roberts, 448 U.S. 56 (1980)-- allowing a judge to determine reliability and dispense with confrontation and cross-examination-- was a break from the design of the Framers by "replacing categorical constitutional guarantees with open-ended balancing tests..." 541 U.S. at 67-68.

3. Constitutional Reliability Cannot be Measured by the Roberts Test which was Determined to be Fundamentally Wrong

Nevada and its amici suggest that applying the only constitutional method for determining reliability of testimonial statements may decrease accuracy arguing that possibly reliable hearsay will be excluded because the declarant is not available for cross examination.[12]

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[12] Justice Scalia, dissenting in Maryland v. Craig, 497 U.S. 836 (1990), commented on a similar argument: "To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty." Id. at 867

The first problem with this argument is that it mischaracterizes the constitutional principle of reliability. As used in this Court's cases, particularly Teague v. Lane, 489 U.S. 288 (1989), reliability refers to the product of an adequate constitutional process, that is, a result in which the Court has confidence. See, e.g., Strickland v. Washington, 466 U.S. 668, 693-94 (1984) (ineffective assistance of counsel prejudicial when it "undermines the reliability of the result of the proceedings" or "confidence in the outcome"). In Crawford itself, the Court made it clear that reliability, as used in the sense it is used in Teague, means that the same process of ensuring accuracy is constitutionally adequate:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61.

Thus the reliability inquiry under Teague examines the effect of the new rule on the process of determining reliability, not on its effect on individual bits of evidence. Accepting Nevada's argument on this point would make the test impossible to satisfy. No human system can ensure that only truthful testimony will be admitted and only false testimony excluded: a practiced and persuasive, or delusional liar, may fool a judge and jury no matter how well cross-examined, and a poor witness may not be believed no matter

how truthful he is. Use of all the protections available under the Constitution may result in convictions that are eventually shown not to be worthy of confidence. See, e.g., Banks v. Dretke, 540 U.S. 668, 698 (2004) (Failure to disclose favorable evidence is prejudicial when it puts the "whole case in such a different light as to undermine confidence in the verdict." (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).[13]

This part of Nevada's argument is eviscerated by its concession that the right to counsel rule of Gideon, would qualify as a reliability-enhancing rule under Teague. Nevada's Brief. at p. 26. While the right to counsel does undoubtedly enhance reliability it also results in the exclusion or attacking of prosecution evidence that may be entirely truthful. The point, of course, is that representation by counsel increases the reliability of the proceeding, whatever effect it may have on individual items of evidence. In Crawford itself, this Court indicated the improvement in reliability that the rule would cause by contrasting it with the "unpardonable vice of the Roberts test" which is not merely its unpredictability, but "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Crawford, 541 U.S. at 63. In short, contrary to Nevada's argument, the Crawford rule is entirely directed toward reliability under the Teague standard,

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[13] The report by the Department of Justice on DNA exonerations illustrates this point. In many of the cases in which DNA evidence ultimately exonerated the defendant, there was strong identification evidence and trials in which the constitutional procedures were followed did not disclose the falsity of those identifications. See U.S. Department of Justice, Convicted by Juries Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial 16-17 (1996).

and "goes to the heart of the truthfinding function," Solem v. Stumes, 465 U.S. 638, 645 (1984).

The second problem with this argument is that in order to conduct the analysis that Nevada proffers, the "amorphous," "unpredictable," and "entirely subjective" process, condemned by Crawford, 541 U.S. at 63 must be employed. In Crawford, this court refused to perpetuate the "fundamental failure" of the Roberts rule by engaging in the reliability assessment it had rejected. 541 U.S. at 62. It is apparent that Nevada and its amici simply disagree substantively with the holding in Crawford. The only method for determining the reliability of testimonial statements is confrontation and cross-examination—a comparison based upon reinvocation of a subjective evaluation of reliability is simply not acceptable after Crawford.

4. A Rule Can be Both a Watershed Rule and Subject to Harmless Error Analysis

Nevada and its amici argue that Crawford cannot be a watershed rule if violations of the Confrontation Clause are not structural and are subject to harmless error analysis. Nevada's Brief, p. 29; Brief of Texas, et al., p. 11. Nevada does not offer any analytical support for this point and there is none. Whether a fundamental error is structural depends on whether its effect on the trial can be assessed or not. Whether a fundamental rule should be applied retroactively depends on whether the error affects the reliability of the proceedings. There is nothing "anomalous" about treating these issues differently. See Tyler v. Cain, 533 U.S. 656, 665 (2001).

Crawford error does affect reliability, but the effect on the trial proceedings can be measured by examining the record

and making a traditional assessment of harmlessness, depending upon the centrality of the hearsay in question, the potential effect of adequate cross-examination, and the strength or weakness of the other evidence. That analysis is not possible, or permissible, in the case of a structural error.[14] Similarly, this Court held very recently that refusal to allow a defendant to be represented by counsel of his choice was structural error, because the effect of having other counsel could not be assessed. United States v. Gonzales-Lopez, 126 S.Ct. 2557, 2564-65, n.5 (2006). But in light of the fact that the defendant received effective representation from the appointed counsel, it would be hard to argue that the Gonzalez-Lopez rule affected the reliability of the trial.

5. Gideon, like Crawford changed our understanding of a constitutional right at a conceptual level but did not create a new right

Nevada and its amici argue that the Crawford rule is not a "watershed" rule, i.e., it is not as "fundamentally groundbreaking" as the right to counsel created in Gideon. Nevada's Brief, p. 22. Nevada's argument fails to recognize that what was "groundbreaking" about Gideon was acknowledgment that the assessment of the need for counsel could no longer be dependent upon individual assessments of "special circumstances." The watershed change was Gideon's return to "old precedents" in order to "restore constitutional

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[14] For instance, the improper exclusion of a juror in violation of Batson v. Kentucky, 476 U.S. 79 (1986) is a structural error, because there is no means of assessing prejudice; but when the jury actually impaneled is impartial, the error does not affect the reliability of the proceedings and thus Batson was held not to be retroactive. Allen v. Hardy, 478 U.S. 255, 259 (1986)(per curiam).

principles established to achieve a fair system of justice." 372 U.S. at 344. The "sweeping" change effected by Gideon cannot be found in the number of cases it affected but in the change in the way the constitutional right was understood.

When Gideon was decided, the right to appointment of counsel in capital cases in state courts was clear. Hamilton v. Alabama, 368 U.S. 52 (1961). The "special circumstances" requirement in non-capital proceedings had become so eroded by decisions of this Court that Justice Harlan commented in his concurring opinion in Gideon that "[i]n truth the Betts v. Brady rule is no longer a reality." 372 U.S. at 351. The rule in Gideon, by the time it was decided, affected only non-capital cases in which there were no "special circumstances" and in which the requirements of due process did not already require appointment of counsel. Justice Harlan noted that this Court's decisions prior to Gideon had steadily eroded the "special circumstances" limitation on the right to counsel in all serious cases to the point where the rule was "honored by this Court only with lip service..." (Harlan, J. concurring).

Unlike Gideon, however, before Crawford courts were not applying the sounder, original constitutional principles because Roberts, unlike Betts, continued to be a reality—and "core testimonial statements that the Confrontation Clause plainly meant to exclude" were frequently admitted. See list of illustrative cases. 541 U.S. at 64-65.

Gideon, like Crawford, has limitations. The right to appointment of counsel does not extend to non-felony trials if no term of imprisonment is imposed. Scott v. Illinois, 440 U.S. 367, 373-74 (1979); and it does not apply to discretionary appeals. Ross v. Moffitt, 417 U.S. 600, 610 (1974).

If Gideon is to be the touchstone for determining whether a rule is of watershed stature, we know that whether a rule is a "watershed" rule is not defined by the number of cases actually affected.[15] We know from the history of the rule in Gideon, that a rule can still be of "watershed" status, even if the old rule (Betts) included protections of the fairness of the proceeding. What makes the rule in Crawford like the rule in Gideon is the alteration in the understanding of the fundamental nature of the constitutional right.

6. Crawford, like Gideon, was a return to original constitutional principles

So, too, is Crawford like Gideon in its return to original constitutional principles.[16] The rights codified by the Confrontation Clause had evolved under the common law,[17]

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[15] While the Brief of Texas et al., asserts that retroactive application of Crawford "could imperil countless criminal convictions," Brief of Texas et al., p. 16, a review of forty nine opinions located in state and federal courts actually applying Crawford either on direct appeal or on post-conviction in the Ninth Circuit only five resulted in the granting of relief. See Appendix I.

[16] The decision of the Ninth Circuit could be affirmed on the alternative ground that Crawford is not a new rule under Teague and thus there is no impediment to granting relief. See Concurring Opinion of Judge Noonan in Bockting v. Bayer, 399 F.3d 1010, 1023 (9th Cir. 2005).

[17] The Sixth Amendment went well beyond the historical reach of the common law. At the time of the adoption of the constitution, the common law did not allow representation by counsel in felony cases, nor did it provide for adequate notice of the charges. See generally 4 William Blackstone, Commentaries on

but the common law rule with respect to hearsay (putting aside the very limited common law exceptions not at issue here) was already clear and unequivocal: "A mere hearsay is no evidence." Geoffrey Gilbert, The Law of Evidence 149-150 (1st Amer. ed. 1788), and 152 (1769).[18] The policy of the rule tracked the concerns underlying the constitutional confrontation guarantee:

> It seems agreed, that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath but also because the other side hath no opportunity of a cross examination. . . . .

William Hawkins, A Treatise of the Pleas of the Crown 431 (2nd ed. 1724).[19]

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the Laws of England 318, 349-50 (1769).

[18] No less an authority than Sir Edward Coke derided it as a "strange conceit . . . that one may be an accuser by hearsay. . ." 3 Edward Coke, The Third Part of the Institutes of the Laws of England *25 (1644); Theory of Evidence 111 (1761); The Law of Evidence 148 (1717) ("A hear-say was not to be allowed as a direct evidence"); Giles Duncombe, Tryals Per Pais Appendix, 15 (1702) ("Hearsay or a report of what another man said, is no evidence against a prisoner"); Francis Buller, An Introduction to the Law Relative to Trials at Nisi Prius 294 (5th ed. 1785); 12 Charles Viner, A General Abridgment of Law and Equity 118 (2d ed. 1791) ("hearsay from others is not to be applied immediately to the prisoner. . . hearsay was not to be allowed as a direct evidence").

[19] "HEARSAY, is generally not to be admitted as evidence; for no evidence is to be allowed but what is upon oath; for if the first speech was without oath, another

The new United States recognized the same principles, an early manual for justices of the peace affirmed the "general rule that hearsay is no evidence ," William Hening, The New Virginia Justice 279 (1825),[20] and early American cases followed this principle routinely.[21]

> oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice, and, besides, the adverse party had no opportunity of a cross examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit."

1 John Burn, A New Law Dictionary 421 (1792); see also Thomas Peake, A Compendium of The Law of Evidence 8 (Phila. 1802).

[20] An earlier edition of Hening's manual criticized the Marian deposition procedure as "liable to these objections;-that the prisoner may be concluded by evidence however objectionable the witness may be in point of interest, guilt, and that the accused party has not the same advantage of cross examination, which he would possess before a court, with the assistance of counsel." William Hening, The New Virginia Justice 148 (1795). In a later edition, Hening noted that the statutory basis for conducting and admitting depositions under the Marian statutes "is not recognized in Virginia." William Hening, The New Virginia Justice, 785 (1825), citing 4 St. George Tucker, Blackstone's Commentaries 296 n.1. (1803); see also The New-Hampshire Justice of The Peace 163 (1824) ("hearsay is not evidence. It is a general rule that if any fact is to be substantiated against a person, it ought to be proved by the testimony of a witness sworn to speak the truth.).

[21] Both criminal and civil cases affirm the general prohibition on admitting hearsay. Mackaboy v. Comm., 4 Va. 268 (1821) (taking of inquisition as basis of conviction violated defendant's

In Mr. Bockting's case, there can be no dispute that the critical evidence against him was rank hearsay,[22] that would have been inadmissible under the law in effect at the time of

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state right to confrontation, even though he was present and allowed to speak at inquisition) Comm. v. Chabbock, 1 Mass. 144 (1804) (statement from third party supposedly admitting to commission of offense excluded as hearsay); State v. Webb, 2 NC 103 (1794) (depositions must be taken in defendant's presence to be admissible at trial because "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."); Respublica v. Langcake, 1 Yeates 415 (Pa. 1795) (declarations of dead co-defendant inadmissible by other defendants as hearsay). Perine v. Van Note, 4 N.J.L. 146 (1818) (re-examination of witnesses by jury in absence of parties requires reversal. "No man can be condemned in our law without hearing the witnesses against him, or having an opportunity to hear them, and to cross-examine them"); Bartlet v. Delprat, 4 Mass. 702 (1808); Bridge v. Eggleston, 14 Mass. 245, 251 (1817) (hearsay "is never received as evidence"); Penner v. Cooper, 18 Va. 458, 1815 (1815) (hearsay admission by third party not admissible to exculpate defendant in civil case); Nettles v. Harrison, 13 S.C.L. 230 (1822) ("that hearsay shall not be received as evidence, is so well established, that it would be an imputation on anyone, pretending to be conversant with the law, to say that he did not know it".); Wilson v. Boerem, 15 Johns. 286 (N.Y. Sup. 1818); Longenecker v. Hyde, 6 Binn. 1, 2 (1813) (third party's hearsay statement that he received merchandise not admissible since "defendant had a right to the oath of [the declarant] and the opportunity of cross-examining him in public").

[22] Laura Bockting's testimony, purporting to relay Autumn's supposed statements to her, was equally inadmissable hearsay, but the court of appeals did not address that testimony in its decision, finding that relief should be granted based solely upon the prejudicial admission of the testimonial hearsay of the detective.

the adoption of the Constitution. An English case decided shortly after the adoption of the Constitution demonstrates how Mr. Bockting's case would have been resolved under the common law in effect then, even without the explicit constitutional confrontation guarantee. In King v. Brasier, 1 Leach 199, 168 Eng. Rpts. 2002 (K.B. 1779), the common law judges had decided that if a child could not understand the oath, and thus could not be sworn, the child's information was not admissible. Thomas Leach, Cases in Crown Law Determined by the Twelve Judges 346 (1789). Later, in King v. Tucker (1808), a judge on assizes tried the defendant for an offense against a child. "The child who appeared to be about 5 years old was produced but seemed to have no idea of the nature of an oath; nor indeed could she be prevailed on in court to answer any question that was put to her." D.R. Bentley, ed., Select Cases from The Twelve Judges' Notebooks 102 (1997). The court accordingly allowed the child's mother to recount the child's statements to her, and the defendant was convicted. The court stated that "[w]hen the child's mother was examined I doubted whether I ought to receive her account of the information she had from the child," and reserved the legal question for review by the twelve judges, whose answer was laconic but clear: "conviction wrong." Id. at 105.

7. While Crawford is Like Gideon, it is Unlike Any Case in Recent Constitutional Jurisprudence

The analysis of the nature of the right under discussion in Crawford begins with a declaration that the right to confrontation is a "bedrock procedural guarantee." 541 U.S. at 42. This language is found in the earliest discussions of retroactivity principles. Teague, 489 U.S. at 311-12 quoting Mackey v. United States, 401 U.S. 667, 693-94 (1971). The

decision proceeds, then, to lay out a completely new way of looking at the constitutional principles involved. Unlike any of the other new rules examined under the Teague standard, Crawford did not merely "renegotiate[] the contours of an existing right" as suggested by Nevada. Nevada's Brief on the Merits, p. 40. Rather, as recognized by the dissenting opinion, Crawford represents a "change of course," 541 U.S. at 76, (Rehnquist, C.J.) not a mere "incremental change." Beard v. Banks, 542 U.S. 406, 419.

Crawford, unlike all of the retroactivity cases decided since Teague, recognized the "fundamental failure" of the Roberts rule and went about demonstrating, with meticulous historical references, how the entire approach of the Court since Roberts, was a departure from historical, constitutional principles and was just dead wrong. Applying Crawford to Mr. Bockting's case is consistent with the principles underlying the presumption of nonretroactivity. Crawford makes clear that a conviction based upon testimonial hearsay, where there has been no opportunity for cross-examination, has always been wrong.

The Brief of the CJLF calls the second Teague exception "a historical relic" which should be permanently shelved. The CJLF suggests that there simply are no more Gideon-like rules to be made. Brief of CJLF, p.13. Justice Scalia, dissenting in Maryland v. Craig, 497 U.S. 836 (1990), envisioned a repulsive scenario which would be permitted under the holding in that case:

> A father whose young daughter has been given over to the exclusive custody of his estranged wife...is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered

> without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I-your father...whom you see before you did these terrible things?

Id., at 861, (Scalia, J., dissenting).

The dissent was referring to the risks resulting from permitting a child witness to testify by closed-circuit television. In Mr. Bockting's case, the child did not testify at all. When Autumn did sit in the presence of her stepfather, before months had passed in the exclusive custody of her mother, she told a completely different story than that related to the jury by the detective. The conviction in this case, secured as it was on untested testimonial hearsay, proves that there are still rules that require correction.

C. THE CURRENT HABEAS CORPUS STATUTE INCORPORATES THE RETROACTIVITY STANDARDS OF TEAGUE v. LANE, AND THEREFORE PERMITS GRANTING RELIEF ON THE BASIS OF A NEW RULE THAT THIS COURT APPLIES RETROACTIVELY

As shown above, this Court must apply the "new rule" of Crawford retroactively, and it must therefore affirm the decision of the court below granting relief to Mr. Bockting. The decision of the Nevada Supreme Court rejecting Mr. Bockting's confrontation clause claim is "contrary to" the federal law which this Court's decision here will have

"clearly established" retroactively. 28 U.S.C. § 2254(d)(1).[23] AEDPA explicitly provides for filing and consideration of habeas corpus petitions based on new rules applied on collateral review by this Court, and nowhere does it expressly or impliedly prohibit granting relief on the basis of such rules under 28 U.S.C. § 2254(d)(1) . Accordingly, AEDPA authorizes granting relief to Mr. Bockting on the basis of the Crawford rule, even though the rule it imposes is a new one.

1. The Text of § 2254(d)(1) Does Not Preclude Granting Relief on the Basis of a New Rule Made Retroactive by this Court

The section stating the substantive standard of review in habeas corpus cases, 28 U.S.C. § 2254(d), was amended by AEDPA to provide:

> An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

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[23] Mr. Bockting's habeas corpus petition was filed after the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and the provisions of the habeas corpus statute amended by AEDPA therefore apply to his case. E.g., Lindh v. Murphy, 521 U.S. 320, 329-30 (1997).

This provision was intended to do two things: to require federal courts to defer to the state court decisions on habeas issues, and to make the decisions of this Court the sole means of making a rule "clearly established Federal law." Williams (Terry) v. Taylor, 529 U.S. at 362, 407-13 (2000); Tyler v. Cain, 533 U.S. 656, 663-64 (2001). The plain language of this section does not expressly provide that a court has no power to grant relief on the basis of a new claim that is applied retroactively under Teague.

In fact, the term "clearly established Federal law" in this section is easily read in harmony with the retroactivity provisions of AEDPA to allow granting relief, in light of the definition of retroactivity. Retroactive means "having relation or reference to or efficacy in a prior time. . . ." Webster's Third New International Dictionary 1940 s.v. retroactive (1993)(emphasis supplied); id., s.v. retroactive law ("a law that. . . . in any way expressly affects an act done prior to the passing of the law. . . ."); Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); see Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994). Once this Court has "made [a new rule] retroactive to cases on collateral review," see 28 U.S.C. § 2244(b)(2)(A), it makes that rule "clearly established"; and the only way such a decision can be given "efficacy in a prior time" is to deem the rule "clearly established" as of the time of the state court decision. In essence, the retroactivity ruling invalidates the previous "clearly established" law and replaces it with the new rule.[24] This interpretation does no violence to

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[24] An order nunc pro tunc has "retroactive legal effect," Black's Law Dictionary 1097 (7th ed. 1999), as of the earlier date.

the text of § 2254(d)(1), which does not contain any temporal language, and it harmonizes the deference provision of that section with the retroactivity provisions Congress included in the same statute.

Nevada and its amici contend, however, that the "clearly established Federal law" language of § 2254(d)(1) can refer only to the law in effect at the time of the state court decision, and that therefore the section totally prohibits granting habeas relief on the basis of a new rule that this Court has "made retroactive to cases on collateral review." See 28 U.S.C. § 2244(b)(2)(A). To prevail on this argument, Nevada must bear the burden of showing that Congress intended to eliminate the existing power of federal courts to grant relief on the basis of new rules solely by implication, without any mention of the issue in §2254(d)(1). Repeals by implication, however, are strongly disfavored: "absent 'a clearly expressed congressional intention,' 'repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" Branch v. Smith, 538 U.S. 254, 273 (2003) (plurality)(citations omitted); Lockhart v. United States, 126 S.Ct. 699, 703 (2005)(Scalia, J., concurring). This principle is at its strongest when the argument is that Congress repealed habeas corpus jurisdiction by implication, since in that situation "Congress must articulate specific and unambiguous directives to effect a repeal." I.N.S. v. St. Cyr, 533 U.S. 289, 298-99 (2001).

A decision by this Court that a rule applies retroactively in collateral proceedings does essentially the same thing as a nunc pro tunc order.

Nevada has not remotely sustained this burden. Nevada's argument is based on language that simply is not in the statute: Nevada relies solely on language in this Court's decision in Lockyer v. Andrade, 538 U.S. 63 (2003), where this Court stated that "clearly established" law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Id. at 71 (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)). The Andrade Court continued, "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle set forth by the Supreme Court at the time the state court renders its decision." Id. at 71-72. From this language, Nevada argues that relief can never be granted on the basis of a retroactive "new rule." Nevada's Brief, p. 43-46. The statute itself, however, does not contain the language "as of the time of the relevant state court decision" that the state would read into it.[25] In the routine habeas case, of course, which does not involve retroactive application of a new rule, the state of "clearly established Federal law" will be assessed "as of the time of the relevant state-court decision;" but the statute does not include any such limiting language that might suggest that the section had any intended effect on situations that do involve retroactivity.[26] Even in an enactment which this

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[25] Since no question of the retroactivity provisions of AEDPA was presented in those cases, the language in Andrade and Williams is dictum with respect to the interpretation of § 2254(d)(1) in cases involving retroactive application of a new constitutional rule. It therefore cannot control the result in this case. See e.g., Williams v. Taylor, 529 U.S. at 412 (only holding rather than dicta has precedential effect).

[26] The fact that the phrase "resulted in a decision that was contrary to . . . clearly established Federal law," § 2254(d)(1) is in the past tense does not suggest that Congress intended to abolish

Court has indicated is not a "silk purse of the art of statutory drafting," Lindh v. Murphy, 521 U.S. 320, 336 (1997), it is not reasonable to infer that Congress intended to abrogate this Court's entire retroactivity jurisprudence without saying a single specific word on the subject; and any such conclusion would be directly contrary to St. Cyr.

2. Section 2254(d)(1) Must be Read in the Context of the Entire Statute, Including the Specific Provisions Codifying Teague and Permitting Application of New Rules in Habeas Proceedings

Neither the text of § 2254(d)(1), nor anything in Nevada's argument, remotely supports its position that the section by implication repeals the entire body of retroactivity jurisprudence that this Court has evolved, including the rules of Teague and Griffith v. Kentucky, 479 U.S. 314 (1987).[27]

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any possibility of relief on new claims under pre-existing law. A state court decision on a constitutional claim will always come before the federal court decision that reviews it, and it was simple common sense that the state decision would be referred to in the past tense.

[27] Nevada's interpretation of § 2254(d)(1) would abrogate, also only by implication, the long-standing and universally accepted rule of Griffith v. Kentucky, 479 U.S. 314 (1987), that a new rule of constitutional law must be applied to cases not yet final on direct appeal. If a state court rejects a constitutional claim, but this Court enunciates a contrary rule after the state decision but before the date of finality under Teague v. Lane, see Clay v. United States, 537 U.S. 522, 527 (2003), the position of Nevada and its amici would prevent granting relief under § 2254(d)(1), because the new rule was not "clearly established" at the time of the state decision. There is nothing in the structure of AEDPA, or in any principle of

Nevada's argument that that was the intent of Congress is even more untenable in light of Congress' inclusion of explicit retroactivity provisions in AEDPA. See below. Since there is no clear language in § 2254(d)(1) that precludes granting relief on a "new rule" claim, this Court must engage in the "holistic endeavor" of statutory construction, Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004), and attempt to find a construction of the statute that harmonizes and gives effect to all its parts. E.g., Stewart v. Martinez-Villareal, 523 U.S. 637, 644 (1998) (refusing to adopt interpretation leading to "far reaching and seemingly perverse" results); United States v. Granderson, 511 U.S. 39, 47 n.5 (1994); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991). Analysis of the effect of § 2254(d)(1) must therefore take into account the provisions of AEDPA that expressly refer to filing and considering petitions based on retroactive application of new rules by this Court. 28 U.S.C. §§ 2244(b)(2) (exception to second or successive petition rule), 2244(d)(1) (exception to statute of limitations), 2254(e)(2) (exception to bar on evidentiary hearing), 2264(a) (exception to restriction of claims to those presented in state court).[28] These provisions incorporate language drawn from this Court's decision in Teague v. Lane, 489 U.S. 288 (1989), and there can be no reasonable dispute that the language in these sections was intended to refer to the Teague retroactivity

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statutory construction, that remotely suggests that Congress intended, entirely by implication, to upset the well-established rule of Griffith.

[28] Respondent Bockting refers to these parts of the statute in this brief as the retroactivity provisions, and they are printed in Appendix II to this brief.

standard.[29] In fact, the legislative history shows that preserving the retroactivity principle enshrined in Teague was actually considered by the chief proponent of the bill. See 141 Cong. Rec. S7478-03 (May 25, 1995)(statement of Senator Hatch).

By incorporating language describing the Teague standards in AEDPA, Congress clearly intended to validate this Court's work in laboriously evolving its

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[29] The terms used in the statute's retroactivity provisions mirror the language of the Teague cases. The term "new rule of constitutional law" is taken directly from the language of Teague itself, See 489 U.S. at 299-306, 310, quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring); see also Caspari v. Bohlen, 510 U.S. 383, 388-389, 397 (1994); Graham v. Collins, 506 U.S. 461, 463, 466 (1993). The term "applied retroactively" also comes directly from the analysis in Teague.489 U.S. at 294-96, 299-301, 303-305, 307, 316; see also Sawyer v. Whitley, 505 U.S. 333, 337 n.4 (1992). The phrase "applied retroactively to cases on collateral review," 28 U.S.C. § 2244 (d)(1), also comes directly from Teague, 489 U.S. at 294-295, 299, 302. Phrases combining the Teague terms "new rule" and "applied retroactively" appeared routinely in this Court's discussions of Teague, before the enactment of AEDPA. See, e.g., Powell v. Nevada, 511 U.S. 79, 84 (1994); Collins v. Youngblood, 497 U.S. 37, 40-41 (1990); Butler v. McKellar, 494 U.S. 407, 415 (1990); Penry v. Lynaugh, 492 U.S. 302, 329 (1989) overruled on other grounds Atkins v. Virginia, 536 U.S. 304 (2002); Withrow v. Williams, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring and dissenting). Congress is presumed to have used these terms to describe the pre-existing scheme of Teague, in the absence of any indication that it intended to change existing law. See, e.g., Lorillard v. Pons, 434 U.S. 575, 581-82 (1978); cf., Williams v. Taylor, 529 U.S. at 403-06 (new language in statute evidences intent to change law).

retroactivity jurisprudence, culminating in Griffith and Teague, and to adopt it as part of AEDPA, with the clarification that only this Court's decisions could make Federal law "clearly established" - - a clarification that Congress made by including specific language in § 2254(d)(1). See Williams (Terry) v. Taylor, 529 at 412.[30]

There is no theory that can rationally reconcile the presence of four provisions in AEDPA incorporating the language of Teague, and specifically directed to consideration of habeas petitions based on retroactively-applied new rules, with Nevada's argument that § 2254(d)(1) prohibits any consideration of claims based on new rules. This Court cannot impute to Congress an intent to erect a system for litigating petitions based on new rules that is simply futile; and nothing in the text of AEDPA approaches the level of specificity required under St. Cyr for limiting the existing habeas jurisdiction of federal courts that Nevada seeks. Accordingly, this Court should reject Nevada's argument and affirm the decision of the Court of Appeals.

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[30] This Court has continued to recognize the vitality of Teague: it has applied Teague principles of retroactivity in AEDPA cases, without suggesting that § 2254(d)(1) would preclude granting relief on a claim based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. § 2244(b)(2)(A), Beard v. Banks, 542 U.S. 406 (2004); Horn v. Banks, 536 U.S. 266, 272 (2002), and it seems clear that Teague "remains the law." See Williams v. Taylor, 529 U.S. at 379(Stevens, J.). It seems highly unlikely that this Court would have devoted its resources to analyzing the Teague issue in those cases as purely a sterile exercise, if, at the end of the day, granting relief was absolutely precluded by § 2254(d).

3. The Examples Cited by Amici for Nevada of Situations in which the Retroactivity Provisions may not be Surplusage does not Alter the Statutory Construction Analysis Harmonizing § 2254(d)(1) with the Teague Provisions

Although Nevada's brief does not address the effect of the retroactivity provisions on the statutory construction analysis,[31] the briefs of amici curiae (the Criminal Justice Legal Foundation and numerous states) make a variety of ingenious but insubstantial arguments in an effort to show that Nevada's interpretation of § 2254 (d)(1) would not render the AEDPA retroactivity provisions "insignificant," Duncan v. Walker, 533 U.S. 167, 174 (2001). Mr. Bockting submits that this Court need not reach these issues in light of the argument presented above, which harmonizes the retroactivity provisions, in their plain meaning with § 2254(d)(1). The retroactivity provisions may have some vitality is not determinative: in which in any event, the amici's arguments are misdirected.

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[31] The Court of Appeals cases holding that § 2254(d) precludes finding that a new rule can be a ground for relief do not offer any statutory construction analysis of the "clearly established" language of § 2254(b), other than stating that it is the "natural" reading of the statute, and do not address the retroactivity provisions of AEDPA at all. Murillo v. Frank, 402 F.3d 786, 789 (7th Cir. 2005); Vasquez v. Stack, 228 F.3d 143, 148 (2d Cir. 2000); Ramdass v. Angelone, 187 F.3d 396, 406 (4th Cir. 1999); Gosier v. Wellborn, 175 F.3d 504, 510 (7th Cir. 1999)("§ 2254(d)(1) means that only rules articulated by the Supreme Court of the United States before the state court rendered its decision may be applied on collateral review." (emphasis in original)); Green v. French, 143 F.3d 865, 873-74 (4th Cir. 1998).

The argument of the amici States in fact supports Mr. Bockting's position that § 2254(d)(1) does authorize granting relief on a new retroactive rule under Teague. The Amici posit a situation in which this Court issues a decision applying a new rule retroactively, and, on the basis of that decision, a petitioner could obtain an evidentiary hearing to develop his claims under the "new rule" provision of § 2254(e)(A)(i). States' Brief, p. 23-24 n.11. The States argue that this scenario shows that § 2254(e)(A)(i) is not mere surplusage as a result of its interpretation of § 2254(d), because at the point that the petitioner sought the evidentiary hearing, the new rule would be "clearly established" by this Court's having "made" the rule retroactive. States' Brief, p. 24 n.11. But that argument assumes that the term "clearly established" in § 2254(d)(1) could mean "established" at the time the federal court granted the evidentiary hearing, not solely at the time of the state court decision on the claim.

The argument implicitly concedes that Nevada's position--that the "clearly established" language of § 2254(d)(1) refers exclusively to the law "at the time of the relevant state-court decision," Nevada's Brief, p.45 (quoting Andrade, 538 U.S. at 71-72) is wrong, because amici argue that the law could be "clearly established" during the federal habeas proceedings. The amici States' argument thus supports Mr. Bockting's position in two ways: first, it suggests that the relevant time period for assessing when the law is "clearly established" is not limited by the text of § 2254(d)(1) to the time of the initial state court decision. If it is conceded that the "clearly established" point is movable, as a result of this Court's decision making the new rule retroactive, then it is far more plausible to conclude that the retroactive application reaches back to the point of the state court decision, which is precisely what the "retroactive" rule is supposed to change. Second, if the amici States argue that the retroactivity ruling changes the

"clearly established" point only to the time of this Court's ruling itself, and does not affect the pre-existing state court ruling, then it would make the retroactivity provisions clearly surplusage: under the States' scenario, this Court could make a new rule retroactive; the federal district court could grant an evidentiary hearing under § 2254(e)(A)(i) based on the new rule; but when it came to adjudicating the claim, the court could not grant relief under § 2254(d)(1) because the new rule was still not "clearly established" at the time of the state court decision. The argument of the Amici States provides no support for a reading of § 2254(d)(1) that essentially reads the retroactivity provisions out of the statute.

Amicus CJLF argues that the retroactivity provisions would not be rendered superfluous by its interpretation of § 2254(d) on the theory that the deference provision does not apply when there is no "relevant state-court decision" (such as when a state court rejects a claim on the basis of an inadequate procedural ruling, or simply does not address a claim); and that, in those situations the retroactivity provisions would retain some vitality despite § 2254(d)(1). CJLF Brief, p. 16-17. But this asserted distinction is illusory: in recognition of the policy behind the § 2254(d)(1) deference provision, most courts of appeals that have addressed the issue have held that, when there is no "relevant state-court decision" to which to defer, the federal court must review this Court's precedents and make an assessment of what an objectively reasonable disposition of the petitioner's claim would have been at the time of the state court decision.[32]

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[32] See Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001)("while we are not required to defer to a state court's decision when that court gives us nothing to defer to, we must still focus primarily on Supreme Court cases in deciding whether the state

Under this caselaw, even in the scenario posited by CJLF, relief could never be granted because the controlling law at the time of the state decision would still be the old law, not the "new rule made applicable to cases on collateral review" which replaced it. CJLF's argument would make the availability of relief depend on whether the state court did or did not decide the claim. Whether the state court resolves a claim on the merits, or rejects it on an inadequate procedural ground, or simply fails to address it, has no rational relationship to whether federal relief should be available. See Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (per curiam)(where habeas petitioner fairly presented constitutional claim to highest state court, court's refusal to address it does not render claim unexhausted so as to make federal review unavailable). The text of § 2254(d)(1) requires the federal court to examine the state court decision to determine substantively whether it is sufficiently reasonable that the federal court must defer to it; but it does not suggest that the availability of any federal review depends on whether the state court did or did not decide a claim that later becomes the subject of a retroactive new rule.

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court's resolution of the case constituted an unreasonable application of clearly established federal law") overruled on other grounds by Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003); Sellan v. Kuhlman, 261 F.3d 303, 311-313 (2d Cir. 2001); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999); Bell v. Jarvis, 236 F.3d 149, 158-59 (4th Cir. 2000)(en banc); Weeks v. Angelone, 176 F.3d 249, 259-60 (4th Cir. 1999)(where state courts rejected claim without stating reasons, federal court must still examine result for unreasonableness under § 2254(d)), affirmed 528 U.S. 225 (2000) (citing standard of deference under § 2254(d)); cf., Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001); Mercadel v. Cain, 179 F.3d 271, 274-75 (5th Cir. 1999)(per curiam)(dictum).

CJLF also argues that the retroactivity provisions would retain vitality if, following the denial of a first federal petition, this Court decided to apply a new rule retroactively, and a petitioner then filed a successive state habeas petition and obtained a state ruling on the merits. If the petitioner then sought to file a successive federal petition,[33] he would need the retroactivity provisions of § 2244(b)(2)(A) and 2244(d)(1)(C) to allow him to file, but § 2254(d)(1) would then allow review of the state court decision, because this Court's decision would have made the new rule "clearly established" at the time of the state decision. CJLF Brief, p. 19-20.

This interpretation would assume a congressional intent to erect a system that would apparently afford relief for new rule claims under § 2254(d)(1) to successive habeas petitioners but not to first habeas petitioners like Mr. Bockting. Mr. Bockting did what this Court's habeas decisions are supposed to encourage: he exhausted his Confrontation Clause claim by raising it throughout the state proceedings, and the Nevada Supreme Court decided the issue against him. According to CJLF, his reward for complying with this Court's exhaustion precedents and obtaining a ruling on the merits, see O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999); Slack v. McDaniel, 529 U.S. 473, 488-89 (2000); Rose v. Lundy, 455 U.S. 509, 520 (1982), is that he cannot obtain relief under § 2254(d)(1) for the violation of Crawford, because the state decision pre-dated any decision to apply Crawford retroactively. If, on the other hand, Mr. Bockting had not raised the claim in the state proceedings at all, and thus there was no state court decision on the issue, he could

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[33] It is assumed he could do so with a year of the substantive decision. See cf. Dodd v. United States, 545 U.S. 353 (2005).

litigate the claim in a successive petition (assuming that no other procedural bars existed). See CJLF Brief, p. 19. Given the importance of exhaustion to the principles of comity and federalism, it is absurd to believe that Congress intended to favor successive habeas petitions over first ones in that manner. See Lonchar v. Thomas, 517 U.S. 314, 324-25 (1996). Essentially, CJLF's argument on this point would divorce the language of § 2254(d)(1) from its role in defining the substantive rule of deference and make it an extraordinarily clumsy means of requiring re-exhaustion following the announcement that a new rule applies retroactively. See Picard v. O'Connor, 404 U.S. 270, 276 (1971). There is nothing in the text of any part of the statute that suggests that this is what Congress intended.

Despite CJLF's creativity, the fact remains that, as a practical matter, interpreting § 2254(d)(1) to bar granting relief on a claim based on a new rule would render the retroactivity provisions "insignificant." Duncan v. Walker, 533 U.S. 167, 174 (2001). CJLF in fact admits that its interpretation of § 2254(d) could lead to a situation in which a new rule of law placing a defendant categorically outside liability for a particular punishment under the first Teague exception (as in Atkins); but if the state courts, for whatever reason, refuse to afford relief the federal courts would be powerless to act. CJLF Brief p. 21-22. However Congress intended to restrict habeas review, it is absurd to believe that it intended such a result.[34]

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[34] CJLF argues that no state court, in the sample of decisions it surveyed, has declined to review claims based on the first Teague exception, and that therefore this possibility should not affect this Court's analysis of the issue. AEDPA explicitly contemplates that state courts may act "contrary to" the controlling federal constitutional law, or make an "unreasonable application"of

Fundamentally the arguments of Amici in support of the state seek to impute to Congress an intent not only to jettison this Court's laboriously-developed retroactivity jurisprudence but to interpret the retroactivity provisions in a manner so Procrustean that they would amount merely to complication for complications's sake. Mr. Bockting, by contrast, has proposed a reading of § 2254(d)(1) that is consistent with its text, consistent with the principles of Teague, harmonious with the statute as a whole, and consistent with the plain meaning of "retroactive": once this Court finds that a new rule satisfies Teague, its decision that the new rule is retroactive places the new rule, nunc pro tunc, in the place of the former "clearly established" law, and thus forms the basis for relief under § 2254 (d)(1). Mr. Bockting submits that this Court should adopt that simple construction of the statute, and hold that § 2254(d)(1) authorizes granting relief on the basis of a new rule that has been made retroactive.

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that law to the facts of the case, § 2254(d). CJLF's argument that Congress should have assumed that state courts will always act reasonably without federal review, in interpreting a statute that specifically to provide federal review for the purpose of preventing state courts from acting unreasonably, is incomprehensible.

III.
CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX I

A.

Court did not grant relief or the court concluded it would not grant relief even if Crawford applied retroactively because the contested evidence was not testimonial:

Brigance v. Knowles, No. CIVS-03-0963-GEB-CMK, 2006 WL 2522401, at *5 (E.D. Cal.) (Aug. 30, 2006) Moen v. Czerniak, No. CV-02-10-JE, 2006 WL 2270879, at *10 (D.Or. Aug. 8, 2006); Jensen v. Pliler, 439 F.3d 1086, 1090 (9th Cir. 2006); Graves v. Yates, No. CIVS032607GEBGGHP, 2005 WL 3031133, at *4 (E.D.Cal. July 1, 2005); King v. U.S., No. 05-0545-CV-W-SOW, 2006 WL 741904, at *6 (W.D. Mo. March 20, 2006); Ferguson v. Roper, 400 F.3d 635, 639 (8th Cir. 2005); Coy v. Renico, 414 F. Supp. 2d 744, 773 (E.D. Mich. 2006); Eldridge v. Director, TDCJ-CID, No. Civ.A. 6:05CV435, 2006 WL 573924, at *5 (E.D. Tex. Feb. 8, 2006); Summers v. Dretke, 431 F.3d 861, 877 (5th Cir. 2005); Qualls v. Russo, ___F. Supp. 2d___, 2006 WL 2357019, at *4 (D. Mass Aug. 1, 2006); Tracy v. Olson, 400 F. Supp. 2d 393, 402 (D. Mass 2005); People v. Sharp, ___P.3d___, 2005 WL 2877807, at *6 (Colo. Ct. App. 2005); McDonald v. Commonwealth, No. 2004-CA-002168, 2006 WL 891110, at *4 (Ky. Ct. App. 2006); Commonwealth v. Kartell, No. 1999-0655, 2005 WL 2739786, at * 9 (Mass. Super. Ct. 2005); People v. Walker, 697 N.W.2d 159, 163 (Mich. Ct. App. 2005); State v. Carter, 114 P.3d 1001, 1007 (Mont. 2005); People v. Bradley, 799 N.Y.S.2d 472, 480 (N.Y. App. Div. 2005); In re D.L., No. 84643, 2005 WL 1119809 (Ohio Ct. App. 2005); Commonwealth v. Eichele, 66 Pa. D. & C.4th 460, 469 (Pa. Commw. Ct. 2004); State v. Feliciano, ___A.2d___, 2006

WL 1932661, at *8 (R.I. 2006); State v. Hemphill, 707 N.W.2d 313, 316 (Wis. Ct. App. 2005).

B.

Court did not grant relief or the court concluded that it would not grant relief even if Crawford applied retroactively because the error was harmless:

Clemens v. Shasta County Sheriff, No. S-03-1006 LKKCMKP, 2006 WL 2458712, at *4 (E.D. Cal. Aug. 22, 2006); Cook v. McGrath, No. C03-2719JSW(PR), 2006 WL 2479111, at *7 (N.D. Cal. Aug. 28, 2006); Lee v. Lamarque, No. CVF03-6855 AWI WMW HC, 2006 WL 2223876, at *4 (E.D. Cal. Aug. 2, 2006); U.S. v. Ramirez, No. 97-CR-60012-6-HO, 2006 WL 1788206, at *1 (D. Or. June 23, 2006); Villareal v. Alameida, No. 04-57202, 2006 WL 1627354, at *1 (9th Cir. 2006); German v. Lamarque, No. C 02-1647 SBA, 2005 WL 1926625, at *12 (N.D. Cal. Aug. 10, 2005); Kopp v. Hill, No. 03-222-MA, 2005 WL 1389062, at *6 (D. Or. June 7, 2005); Reedus v. Stegall, No. Civ.A. 00CV73585DT, 2005 WL 1630103, at *1 (E.D. Mich. July 11, 2005); Kamara v. U.S., No. 04 Civ. 5340RMBJCF, 2005 WL 1337396, at *3 (S.D.N.Y. June 6, 2005); U.S. v. Reifler, 446 F.3d 65, 87 (2nd Cir. 2006); Daniels v. Ortiz, No. 05-1924, 2006 WL 2465416, at *12 (D. N.J. Aug. 22, 2006); T.P. v. State, 911 So.2d 1117; (Ala. Crim. App. 2004); People v. Purcell, 846 N.E.2d 203, 215 (Ill. App. Ct. 2006); Commonwealth v. Kartell, No. 1999-0655, 2005 WL 2739786, at * 9 (Mass. Super. Ct. 2005); Bynum v. State, 929 So.2d 312, 315 (Miss. 2006); State v. Gomez, 163 S.W.3d 632, 648 (Tenn. 2005).

C.

Court did not grant relief or the court concluded that it would not grant relief even if Crawford applied retroactively because the petitioner had a prior opportunity to cross-examine the declarant:

Salas v. Lamarque, No. 04-55861, 2006 WL 2535224, at *1 (9th Cir. 2006); Mouton v. Runnels, No. C03-5691JF(PR), 2006 WL 1343679, at *15 (N.D. Cal. May 17, 2006); Schunn v. Schriro, No. CV04-1905PHXNWVMS, 2006 WL 571630, at *9 (D. Ariz. March 7, 2006); Hassinger v. Adams, No. C05-01011WHA, 2006 WL 294798, at *3 (N.D. Cal. Feb. 7, 2006); Greene v. Runnels, No.C03-1361JF(PR), 2005 WL 3481476, at *14 (N.D. Cal. Dec. 19, 2005); Huckabee v. Adams, No. CIVS011795DFLCMKP, 2005 WL 3470670, at *5 (E.D. Cal. Dec. 14, 2005); McGee v. Knowles, No. C02-2661, 2005 WL 2171834, at *11 (N.D. Cal. Sept. 6, 2005); Lewis v. Woodford, No. S-02-0013, 2005 WL 2643172, at *8 (E.D. Cal. July 12, 2005); Williams v. Uchtman, No. 04C5019, 2006 WL 931704, at *5 (N.D. Ill. April 5, 2006); Corona v. State, 929 So.2d 588, 595 (Fla. Dist. Ct. App. 2006).

D.

Crawford Applied and relief granted:

U.S. v. Ramirez, No. 97-CR-60012-6-HO, 2006 WL 1788206, at * 1 (D. Oregon, June 23, 2006) Miller v. Fleming, No.C04-1289P, 2006 WL 435466, at *10 (W.D. Washington, Feb. 21, 2006); U.S. v. Peth, No. C04-2305RSM, 2006 WL 278560, at *2 (W.D. Washington, Feb. 2, 2006); Zamora v. Adams, No. 03-57074, 2005 WL 2271723, at *2 (9th Cir., Sept. 19, 2005); Gonzalez v. Hamlet, No. CV-F-03-5695RECDLBHC, 2005 WL 1828529, at *14 (E.D. Cal., July 25, 2005).

APPENDIX II

Retroactivity Provisions in AEDPA

28 U.S.C. § 2244 (b)(2) provides, in pertinent part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless–
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

28 U.S.C. § 2244 (d)(1) provides, in pertinent part:

> A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of–
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, of the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. . . .

28 U.S.C. § 2254 (e)(2) provides, in pertinent part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

28 U.S.C. § 2264 (a) provides, in pertinent part:

> Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is –
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable . . . .

See also 28 U.S.C. § 2255 ¶¶ 6, 8.